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HAFIZAH HAMZAH v. TRANS RESOURCES CORPORATION SDN BHD

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
MARY LIM JCA
B YEOH WEE SIAM JCA
[CIVIL APPEAL NO: W-03-(IM)-34-05-2017]
12 JUNE 2018

C ***CIVIL PROCEDURE:*** *Proceedings – Garnishee – Enforcement of judgment debt – Appeal against High Court's decision to not set aside garnishee absolute order granted by Senior Assistant Registrar – Whether there was conclusive debt in existence or accruing – Rules of Court 2012, O. 38 & O. 49 rr. (1), (5)*

D ***CIVIL PROCEDURE:*** *Judgments and orders – Judgment debt – Enforcement of judgment debt – Appeal against High Court's decision to not set aside garnishee absolute order granted by Senior Assistant Registrar – Whether there was conclusive debt in existence or accruing – Rules of Court 2012, O. 38 & O. 49 rr. (1), (5)*

E A dispute between the respondent, the judgment creditor ('JC'), and Carmichael Asia Sdn Bhd, the judgment debtor ('JD'), culminated in an arbitration award rendered in the former's favour. The JC initiated judgment debtor summons proceedings against the JD. During the proceedings, JD's auditor ('the auditor') testified that there was a sum of RM1,416,279 owing from the directors of the JD and the appellant ('the garnishee') was singled out as the director who owed monies to the JD. Relying on this information, the JC filed garnishee proceedings at the High Court, pursuant to O. 49 of the Rules of Court 2012 ('ROC'), seeking to garnish the debt of RM1,416,279 that the garnishee purportedly owed to the JD. Denying that she owed the JD, the garnishee (i) submitted that she had fully paid her purchase of shares in the JD and did not take advances from the JD; and (ii) tendered a statutory declaration ('SD') from the auditor where he corrected his earlier statement, explaining that his evidence was given without the benefit of a certain information from the company secretary and he confirmed that there was no debt due from the garnishee. The High Court Judge ('HCJ') rejected the garnishee's contention and held that (i) the JD's financial statement clearly stated that a loan of RM1,416,279 was owed by the directors of the JD; and (ii) the auditor repeatedly testified that that amount was a loan granted by the JD to the garnishee and was still owing. On appeal, the Court of Appeal set aside the decision of the HCJ and directed the High Court to hear the issue under O. 49 r. 5 of the ROC. The HCJ dismissed the appellant's appeal without alluding to the specific directions of the Court of Appeal and O. 49 r. 5 of the ROC was not addressed. Hence, the present appeal.

Held (allowing appeal; setting aside order of High Court)
Per Mary Lim JCA delivering the judgment of the court:

(1) The Court of Appeal specifically directed a re-hearing under O. 49 r. 5 of the ROC. Nowhere in the grounds of judgment did the HCJ address this. However, from a careful reading of the grounds, the HCJ had nevertheless implicitly dealt with the matter in the manner directed. His Lordship considered the appeal and had summarily determined the dispute of liability by the garnishee. (para 10)

(2) The alleged debt could not be garnished as it had not complied with the requirements of O. 49 r. 1 of the ROC. There must be a debt owed by the garnishee to the JD. It must be clear that it was the garnishee who was indebted to the JD and not someone else. The JC relied on the 2012 financial statement of the JD and the evidence of the auditor to prove the existence of the garnishee's debt owed to the JD. Both pieces of the evidence were seriously flawed and unreliable. There was uncertainty as to whether the alleged debt was the debt of the garnishee solely or the debt of any or some or all of the directors of the JD. There were five directors according to the company records filed with the Companies Commission. The 2012 financial statement of the JD stated that the amount was owed by the 'directors' to the JD. It did not state whether the total amount or any part of it was, in fact, owed to the JD by the garnishee. (paras 13-16)

(3) The garnishee denied owing the alleged debt to the JD and it was not a mere denial; she had provided evidence to the contrary. There was evidence showing the allotment of shares after the garnishee had fully paid for the purchase of her shares. This piece of evidence was not examined or evaluated at all by the HCJ. This evidence showed that the JC's claim of the existence of a debt owed by the garnishee, by reason of non-payment of her purchase of shares in the JD, was unsustainable. (paras 17 & 19)

(4) The JC relied on the evidence of the auditor, who testified that the sum of RM1,416,279 was owed by the garnishee. The auditor agreed with the suggestion of the JC that this sum was then 'a loan' to a director and that the 'loan amount was owed back to the company'. It was unclear how that sum for the unpaid shares had now become a loan to a director. This was without production of any Board resolutions for that purpose. Furthermore, there was also the contradictory evidence of the auditor. At the hearing of the judgment debtor summons proceedings, the auditor testified that the loan amount stated in the 2012 financial statement was owed by the garnishee to the JD; that it was payment towards the garnishee's acquisition. However, he subsequently retracted

his statement by filing a SD, refuting his earlier contention that the loan to the directors was owed by the garnishee to the JD. The HCJ declined to look at the auditor's SD, seeing it as an attempt to bypass O. 38 r. 1 of the Rules of the High Court 1980 ('RHC'). (paras 20-23)

(5) The present proceedings did not involve a trial within the terms of O. 38 of the RHC (now O. 38 of the ROC). It certainly could not be said that the SD was prepared in order to bypass any provisions of the ROC. The garnishee adduced evidence in answer to the cause issued against her. She was entitled to adduce evidence to prove her responses. It was incumbent on the HCJ to (i) properly appreciate the full circumstances, including considering whether O. 38 of the ROC, in fact, applied and how O. 49 operated in the event of such happenstance; (ii) critically analyse the evidence taken at the judgment debtor summon proceedings in order to determine whether there was credible evidence upon which the court may grant the garnishee order absolute; (iii) consider whether the auditor was, in fact, contradicting himself in the first place; and (iv) evaluate the contents of the SD against the affidavits filed by both parties. (para 24)

(6) The JC's application did not meet the requirements of O. 49 of the ROC in another material respect; before an order to garnish may be issued, the debt must be 'due or accruing to the JD'. Having examined the 2012 financial statement of the JD, it was not a 'debt due or accruing to the JD'. At Note 9 in the notes to the 2012 financial statement, it was stated 'This amount is unsecured, interest-free and has no fixed terms of repayment'. Note 9 puts it beyond doubt that the amount of RM1,416,279 was not a debt within the terms of O. 49. The debt had yet to crystallise as it was 'unsecured, interest-free and has no fixed terms of repayment'. With no fixed terms of repayment, it was unclear how the JD would have been able to mount a claim against the director concerned, whoever it may be. If the JD was unable to claim upon such a debt, clearly the sum of RM1,416,279 was not a 'debt due or accruing due' within the meaning and intent of O. 49 of the ROC. (paras 28-29)

Bahasa Malaysia *Headnotes*

Satu pertikaian yang timbul antara responden, pemiutang penghakiman ('JC') dan Carmichael Asia Sdn Bhd, penghutang penghakiman ('JD') berakhir dengan award timbang tara memihak pada JD. JC memulakan prosiding saman penghutang penghakiman terhadap JD. Semasa prosiding ini, juruaudit JD ('juruaudit') memberi keterangan bahawa terdapat sejumlah RM1,416,279 yang dihutangi oleh pengarah-pengarah JD dan perayu, pihak yang digarnis ('PYD'), diasingkan sebagai pengarah yang berhutang dengan JD. Bersandar pada maklumat ini, JC memfailkan prosiding garnis di

Mahkamah Tinggi, bawah A. 49 Kaedah-kaedah Mahkamah 2012 ('KKM'), untuk menggarnis hutang RM1,416,279 yang dikatakan dihutangi oleh PYD terhadap JD. Menafikan ada berhutang dengan JD, PYD (i) menyatakan dia telah membuat bayaran penuh pembelian saham dalam JD dan tidak mengambil apa-apa pinjaman daripada JD; dan (ii) mengemukakan satu akuan berkanun ('AB') oleh juruaudit dan juruaudit tersebut membetulkan pernyataan yang dibuatnya terdahulu, menjelaskan bahawa keterangannya diberi tanpa manfaat beberapa maklumat daripada setiausaha syarikat dan juruaudit mengesahkan tiada hutang yang perlu dibayar oleh PYD. Hakim Mahkamah Tinggi ('HMT') menolak hujahan PYD dan memutuskan (i) penyata kewangan JD jelas menyatakan satu hutang sebanyak RM1,416,279 dihutangi oleh pengarah-pengarah JD; dan (ii) berulang kali memberi keterangan bahawa jumlah tersebut ialah pinjaman yang diberi oleh JD kepada PYD dan masih belum dibayar. Susulan rayuan, Mahkamah Rayuan mengetepikan keputusan HMT dan mengarahkan Mahkamah Tinggi mendengar isu ini bawah A. 49 k. 5 KKM. Hakim Mahkamah Tinggi menolak rayuan perayu tanpa menyentuh arahan khusus Mahkamah Rayuan dan A. 49 k. 5 tidak dibincangkan. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)

Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Rayuan, secara khusus, mengarahkan pendengaran semula bawah A. 49 k. 5 KKM. Hakim Mahkamah Tinggi tidak membincangkannya dalam mana-mana bahagian pun alasan penghakiman beliau. Walau bagaimanapun, selepas bacaan teliti alasan-alasan beliau, HMT telah, secara tersirat menangani hal perkara ini seperti yang diarahkan. Beliau mempertimbangkan rayuan tersebut dan memutuskan, secara ringkas, pertikaian liabiliti oleh PYD.

(2) Hutang tersebut tidak boleh digarnis kerana tidak memenuhi syarat-syarat A. 49 k. 1 KKM. Mesti terdapat hutang yang perlu dibayar oleh PYD kepada JD. Mesti juga jelas bahawa PYD yang berhutang dengan JD dan bukan orang lain. JD bergantung pada penyata kewangan 2012 JD dan keterangan juruaudit untuk membuktikan kewujudan hutang yang perlu dibayar oleh PYD kepada JD. Kedua-dua keterangan ini cacat serius dan tidak boleh diguna pakai. Terdapat kesamaran tentang sama ada hutang tersebut ialah hutang PYD seorang atau hutang mana-mana atau beberapa pengarah JD. Terdapat lima orang pengarah menurut rekod syarikat yang difailkan di Suruhanjaya Syarikat. Penyata kewangan 2012 JD menyatakan bahawa jumlah tersebut dihutangi oleh 'pengarah-pengarah' JD. Penyata kewangan tersebut tidak menyatakan sama ada keseluruhan jumlah atau sebahagiannya, yang sebenarnya, dihutangi oleh PYD pada JD.

(3) PYD menafikan berhutang jumlah yang didakwa pada JD dan ini bukan satu penafian semata-mata; dia telah mengemukakan keterangan bertentangan. Terdapat keterangan yang menunjukkan pembahagian saham selepas PYD telah membayar penuh pembelian saham-sahamnya. Keterangan ini tidak disemak atau dinilai langsung oleh HMT. Keterangan ini menunjukkan tuntutan JC tentang kewujudan hutang yang perlu dibayar oleh PYD, akibat kegagalan membayar belian saham dalam JD, tidak boleh dikekalkan.

(4) JC juga bergantung pada keterangan juruaudit, yang menyatakan sebanyak RM1,416,279 dihutangi oleh PYD. Juruaudit bersetuju dengan cadangan JC bahawa jumlah ini adalah 'pinjaman' kepada pengarah dan bahawa 'jumlah pinjaman ini terhutang pada syarikat'. Tidak jelas bagaimana jumlah untuk saham tidak berbayar ini kini menjadi pinjaman buat seorang pengarah. Ini dibuat tanpa pengemukaan apa-apa resolusi Lembaga untuk tujuan ini. Tambahan lagi, terdapat juga keterangan bercanggah oleh juruaudit. Semasa pendengaran prosiding saman penghutang penghakiman, juruaudit memberi keterangan bahawa jumlah pinjaman yang dinyatakan dalam penyata kewangan 2012 dihutangi oleh PYD terhadap JD; bayaran ini adalah untuk pengambilalihan PYD. Walau bagaimanapun, juruaudit menarik balik kenyataannya dengan memfailkan AB, menyangkal dakwaannya yang terdahulu bahawa pinjaman kepada pengarah-pengarah dihutangi oleh PYD terhadap JD. Hakim Mahkamah Tinggi enggan melihat pada SD juruaudit dan berpendapat ini satu helah memintas A. 38 k. 1 Kaedah-kaedah Mahkamah Tinggi ('KKMT').

(5) Prosiding ini tidak melibatkan satu perbicaraan dalam terma A. 38 KKMT (kini A. 38 KKM). Tidak boleh dikatakan bahawa AB disediakan untuk memintas apa-apa peruntukan KKM. PYD mengemukakan keterangan untuk menjawab kausa yang dikemukakan terhadapnya. Dia berhak mengemukakan keterangan untuk membuktikan responnya. Hakim Mahkamah Tinggi memikul tugas wajib (i) mempertimbangkan hal keadaan penuh dengan teratur, termasuk mempertimbangkan sama ada A. 38 KKM sebenarnya terpakai dan bagaimana A. 49 terpakai dalam keadaan sedemikian; (ii) menganalisis, secara kritikal, keterangan yang diambil semasa prosiding saman penghutang penghakiman untuk menentukan sama ada terdapat keterangan yang boleh dipercayai yang membolehkan mahkamah memberi perintah mutlak garnis; (iii) mempertimbangkan sama ada juruaudit sebenarnya bercanggah dengan dirinya sendiri; dan (iv) menilai kandungan AB berbanding afidavit-afidavit yang difailkan oleh kedua-dua pihak.

(6) Permohonan JD tidak memenuhi syarat-syarat A. 49 KKM dalam satu lagi aspek; sebelum satu perintah menggarnis boleh dikeluarkan, hutang tersebut mesti 'perlu dibayar dan terakru pada JD'. Setelah memeriksa penyata kewangan 2012 JD, ini bukan 'hutang yang perlu dibayar atau terakru pada JD'. Dalam Nota 9 yang terdapat dalam nota-nota penyata kewangan 2012, dinyatakan bahawa 'Jumlah ini tidak bercagar, bebas-faedah dan tidak mempunyai terma-terma tetap bayaran semula'. Nota 9 jelas menunjukkan, melampaui keraguan munasabah, bahawa jumlah RM1,416,279 bukan hutang dalam terma A. 49. Hutang tersebut masih belum terbentuk kerana 'tidak bercagar, bebas-faedah dan tidak mempunyai terma-terma tetap bayaran semua. Tanpa terma-terma tetap bayaran semula, tidak jelas bagaimana JD boleh menuntut terhadap pengarah berkenaan, tanpa mengira siapa-siapa pun. Jika JD tidak boleh menuntut hutang ini, RM1,416,279 jelas bukan 'hutang yang perlu dibayar atau terakru' dalam makna dan niat A. 49 KKM.

Case(s) referred to:

Bank of Montreal v. IM Krisp Foods Ltd [1996] 6 CPC (4th) 90 Sask CA ***(refd)***

Binamin MJC Quarry Sdn Bhd v. Way Soon Construction Sdn Bhd; TSR Bina Sdn Bhd (Garnishee); Hong Leong Finance Bhd (Intervener) [2001] 6 CLJ 213 HC ***(refd)***

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] 1 CLJ 357 CA ***(refd)***

Citibank Bhd v. Pembangunan Cahaya Tulin Sdn Bhd & Ors And Other Suits [2012] 1 LNS 416 HC ***(refd)***

Flextronics Technology (Malaysia) Sdn Bhd v. Bumicircuit Technologies (M) Sdn Bhd & Another Appeal [2017] 4 CLJ 397 CA ***(refd)***

Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd & Anor [1988] 2 CLJ 194; [1988] 1 CLJ (Rep) 645 HC ***(refd)***

Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd [2016] 2 CLJ 717 FC ***(refd)***

Maybank Islamic Bhd v. WWE Holdings Bhd [2018] 2 CLJ 589 CA ***(refd)***

Tiong Hoo Teck v. Wong Ho Enterprise Sdn Bhd & Ors [2014] 1 LNS 272 CA ***(refd)***

Legislation referred to:

Arbitration Act 2005, s. 38

Rules of Court 2012, O. 38, O. 49 rr. 1(1), 5

Rules of the High Court 1980, O. 38 r. 1

For the appellant - Shahabudin Shaik Alaudin, Rosnida Che Ibrahim & Nur Fateha Abd Ghani; M/s Shahabudin & Rozima

For the respondent - CC Choo & Karina Lee; M/s CC Choo, Hazila & Teong

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil No: 37G-40-11-2014 (overruled).]

Reported by Najib Tamby

A

JUDGMENT

Mary Lim JCA:

[1] The appellant here is the garnishee in the proceedings before the High Court. Her appeal to set aside the garnishee order absolute dated 6 April 2015 which was ordered by the learned Senior Assistant Registrar was dismissed by the learned judge on 8 October 2015. On 9 August 2016, the Court of Appeal set aside the decision of the learned judge and directed the High Court to hear the issue under O. 49 r. 5 of the Rules of Court 2012 – see pp. 6 & 7 of the appeal records.

[2] On 17 April 2017, the learned judge dismissed the appellant's appeal and the grounds of decision are as appearing at pp. 14 to 22. The grounds do not allude to the specific directions of the Court of Appeal; neither is O. 49 r. 5 addressed.

[3] At the hearing of the present appeal, we further noted that the issue of whether there was a "debt due and accruing due" under O. 49 r. 1(1) of the Rules of Court 2012 was not addressed by the learned judge. We then invited the parties to further address us on the meaning of that phrase, and the explanation of Note 9 in the financial statement of the judgment debtor. This is our decision following the further written submissions of both learned counsel.

Background Facts

[4] A dispute between the respondent and Carmichael Asia Sdn Bhd culminated in an arbitration award rendered in its favour on 7 August 2012. After the award was registered at the High Court under s. 38 of the Arbitration Act 2005 on 14 May 2013, the respondent initiated judgment debtor summons proceedings against Carmichael Asia Sdn Bhd (Carmichael Asia). At those proceedings, one Sivakumaru a/l V Kaliappan (Siva), the auditor of Carmichael Asia testified on 24 June 2014 (and not 24 June 2017 as stated in the grounds of decision, see p. 133 appeal records) that there was a sum of RM1,416,279 owing from the directors of Carmichael Asia as shown in the financial statement of Carmichael Asia for the year ended 31 January 2012. Siva singled out the appellant as the director who owed that sum of money to Carmichael Asia. Although the appellant herself was examined, it was never established that she was the director who owed Carmichael Asia the sum mentioned. The only evidence came from Siva.

B C D E F G H I

[5] Relying on this information, the respondent, as judgment creditor, filed garnishee proceedings pursuant to O. 49 of the Rules of Court 2012 seeking to garnish the debt of RM1,416,279 that the appellant purportedly owes to Carmichael Asia.

[6] In response to the order to show cause, the appellant denied owing Carmichael Asia; claimed that she had fully paid for her purchase of shares in Carmichael Asia even before the shares were issued to her in her name; denied taking any advance from Carmichael Asia, neither were there any advances made to her – see affidavit affirmed on 10 February 2015, pp. 26 to 28 record of appeal (Bahagian B & C)]. The appellant tendered a statutory declaration from Siva wherein Siva corrected his earlier testimony, explaining that his evidence given at the hearing of the JDS was without the benefit of certain information from the company secretary and that he now confirms that there is no debt due from the appellant.

[7] The learned judge rejected the contention of the appellant. The learned judge found that Carmichael Asia's financial statement ended 31 January 2012 was "more than clear and unambiguous in stating that a loan of RM1,416,279 was owed by the directors of Carmichael Asia", that Siva had testified that that amount was a loan granted by Carmichael Asia to the appellant and is still owing and that Siva repeatedly said this during his testimony in the JDS proceedings. The learned judge rejected Siva's statutory declaration on the grounds that it was contradictory to his oral testimony; citing the decision in *Citibank Berhad v. Pembangunan Cahaya Tulin Sdn Bhd & Ors* [2012] 1 LNS 416; [2012] 9 MLJ 181, where the same was prohibited under O. 38 r. 1 of the Rules of the High Court 1980.

Determination Of This Court

[8] Since this was a rehearing on terms that were directed by the Court of Appeal on 9 August 2016, it is imperative that there be compliance of that direction. The order of the Court of Appeal states:

> ... **Dan setelah mendengar** hujahan pihak-pihak yang hadir **maka adalah dengan persetujuan diperintahkan** bahawa:
>
> a) Perintah Mahkamah Tinggi bertarikh 08.10.2015 diketepikan tanpa perintah terhadap kos dan perkara ini dirujuk semula dihadapan Hakim yang sama untuk dibicarakan mengenai isu yang diperuntukkan dalam Aturan 49 Kaedah 5, Kaedah-Kaedah Mahkamah 2012;
>
> b) Deposit dipulangkan kepada Perayu.

[9] The Court of Appeal specifically directed a rehearing under O. 49 r. 5 which reads as follows:

> **Dispute of liability by garnishee (O. 49 r. 5)**
>
> 5. Where on the further consideration of the matter the garnishee disputes liability to pay the debt due or claimed to be due from him to the judgment debtor, the Court may summarily determine the question at issue or order in Form 100 that any question necessary for determining the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried, without, if it orders before the Registrar, the need for any consent by the parties.

[10] Nowhere in the grounds of judgment does the learned judge expressly address this issue. However, from a careful reading of the grounds, we are minded to find that the learned judge has nevertheless implicitly dealt with the matter in the manner directed. His Lordship had considered the appeal and had summarily determined the dispute of liability by the appellant based on the affidavits before the court.

[11] Moving on to what we see as the pivotal issue before this court and that is the question of whether the alleged debt may be garnished pursuant to O. 49 r. 1 of the Rules of Court 2012, as a, "debt due or accruing due to the judgment debtor by the garnishee". Although seemingly simple, this phrase is not "exactly easy to understand", as observed by Suriyadi Halim Omar FCJ in the majority decision in *Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd* [2016] 2 CLJ 717, citing Jackson J in *Bank of Montreal v. IM Krisp Foods Ltd* [1996] 6 CPC (4th) 90 Sask CA. Furthermore, the debt must be due or accruing due at the time of the application for the garnishment order.

[12] For this part of our judgment, we shall thenceforth refer to the appellant as the "garnishee", the respondent as the "judgment creditor" and Carmichael Asia as "the judgment debtor".

[13] After careful consideration of both counsel's oral and written submissions as well as a perusal of the appeal records, we are of the unanimous view that the alleged debt cannot be garnished as it has not complied with the requirements of O. 49 r. 1 in two material respects.

[14] First, there must be a debt owed by the garnishee to the judgment debtor, as seen from the consistent line of authorities – *Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd* [2016] 2 CLJ 717; *Binamin MJC Quarry Sdn Bhd v. Way Soon Construction Sdn Bhd TSR Bina Sdn Bhd (garnishee); Hong Leong Finance Bhd (Intervener)* [2001] 6 CLJ 213; *Maybank Islamic Berhad v. WWE Holdings Berhad* [2018] 2 CLJ 589; *Flextronics Technology (Malaysia) Sdn Bhd v. Bumicircuit Technologies (M) Sdn*

Bhd & Another Appeal [2017] 4 CLJ 397; *Tiong Hoo Teck v. Wong Ho Enterprise Sdn Bhd & Ors* [2014] 1 LNS 272; *Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd & Anor* [1988] 2 CLJ 194; [1988] 1 CLJ (Rep) 645. It must be clear that it is the garnishee who is indebted to the judgment debtor, and not someone else.

[15] In the present appeal, the judgment creditor relied on the 2012 financial statement of the judgment debtor and the evidence of Siva, the judgment debtor's auditor to prove the existence of the garnishee's debt of RM1,416,279 owed to the judgment debtor. Both pieces of evidence were seriously flawed and unreliable.

[16] From the evidence adduced, there is uncertainty as to whether the alleged debt was the debt of the garnishee solely or the debt of any or some or all of the directors of the judgment debtor, and there are five directors according to the company records filed with Companies Commission. The 2012 financial statement of the judgment debtor, stated that the amount was owed by the "directors" to the judgment debtor. It did not, however, state whether the total amount or any part thereof was in fact owed to the judgment debtor by the garnishee.

[17] In addition, at the garnishment proceedings the garnishee had denied owing the alleged debt to the judgment debtor. And, it was not a mere denial.

[18] According to the judgment creditor, the garnishee's debt is in relation to the garnishee's purchase of shares in the judgment debtor. Apparently, the garnishee had not paid for the purchase and the sum of RM1,416,279 represents that debt.

[19] Not only was the allegation of non-payment of the shares and thereby the existence of the debt denied by the garnishee, she had also provided evidence to the contrary. At pp. 112 to 115 of the appeal record is Form 24, evidencing the allotment of shares after the garnishee has fully paid for the purchase of her shares. This piece of material evidence was unfortunately, not examined or evaluated at all by the learned judge. This evidence shows that the judgment creditor's claim of the existence of a debt owed by the garnishee by reason of non-payment of her purchase of shares in the judgment debtor is, unsustainable.

[20] The judgment creditor also relied on the evidence of Siva, who testified that the sum of RM1,416,279 is owed by the garnishee. At pp. 109 and 110, it can be seen that Siva went on to agree with the suggestion of the judgment creditor's counsel that this sum is then "a loan" to a director, and that the "loan amount ini owed back to the Company".

A **[21]** Quite aside from our earlier observations on the improper treatment of this sum of RM1,416,279, it is unclear how that same sum for the unpaid shares has now become a loan to a director. And, this is without production of any Board resolutions for that purpose.

[22] In any case, there is now the contradictory evidence of Siva. At the B hearing of the JDS, Siva testified that the loan amount stated in the 2012 financial statement was owed by the garnishee to the judgment debtor; that it was payment towards the garnishee's share acquisition. However, he subsequently retracted his statement by filing a statutory declaration refuting his earlier contention that the loan to the directors was owed by the garnishee C to the judgment debtor.

[23] The learned judge declined to look at Siva's statutory declaration citing *Citibank Berhad v. Pembangunan Cahaya (supra)*. However, if that decision had been properly considered, the learned judge would have found that the decision made under O. 38 of the Rules of the High Court 1980 has D no application in the present circumstances. That was a case where a witness who was supposed to provide oral testimony attempted to testify instead through a statutory declaration on the ground that he was medically unfit to give evidence at the trial. The admissibility of the statutory declaration, given under such conditions, was challenged. In upholding the challenge, the E court cited O. 38 r. 1 in support, that a witness of fact in writ actions must testify orally and in open court. The court refused to admit the statutory declaration, seeing it as an attempt to "bypass O. 38 r. 1 of the RHC".

[24] The present proceedings do not involve a trial within the terms of O. 38 (now O. 38 of the Rules of Court 2012); and certainly it cannot be said F that the statutory declaration was prepared in order to bypass any of the provisions of the Rules of Court. The garnishee was adducing affidavit evidence in answer to the cause issued against her. She is entitled to adduce evidence to prove her responses. More materially, it was incumbent on the learned judge to properly appreciate the full circumstances including G considering whether O. 38 of the Rules of Court 2012 in fact applied and how O. 49 operates in the event of such a happenstance; critically analyse the evidence taken at the JDS proceedings in order to determine whether there was credible evidence upon which the court may grant the garnishee order absolute; consider whether Siva was in fact contradicting himself in the first H place; and evaluate the contents of the statutory declaration against the affidavits filed by both parties.

[25] The judgment creditor's application does not meet the requirements of O. 49 in another material respect. Before an order to garnish may be issued, the debt must be "due or accruing due to the judgment debtor".

I

[26] Having examined the 2012 financial statement of the judgment debtor, and even if we were to accept that the alleged debt stated therein is the debt of the garnishee, (although there is no evidence to that effect), it is not a "debt due or accruing due to the judgment debtor".

[27] These are the terms of O. 49 r. 1 of the Rules of Court 2012:

> 1(1) Where a person (who is referred to as "the judgment creditor" in this Order) has obtained a judgment or order for the payment of money by some other person (who is referred to as "the judgment debtor" in this Order), not being a judgment or order for the payment of money into Court, and any other person within the jurisdiction (who is referred to as "the garnishee" in this Order), is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount for any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.
>
> (2) ...
>
> (3) In this Order, "any debt due or accruing due" includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured and notwithstanding any restriction as to the mode of withdrawal.

[28] At Note 9 in the Notes to the 2012 Financial Statement, it is stated as follows:

> This amount is unsecured, interest free and has no fixed terms of repayment.

[29] It is our respectful view that Note 9 puts it beyond doubt that the amount of RM1,416,279 is not a debt within the terms of O. 49. The debt has yet to crystallise as it is "unsecured, interest free and has no fixed terms of repayment". With no fixed terms of repayment, it is unclear how the judgment debtor would have been able to mount a claim against the director concerned, whoever it may be. If the judgment debtor is unable to claim upon such a "debt", clearly that sum of RM1,416,279 is not a "debt due or accruing due" within the meaning and intent of O. 49 of the Rules of Court 2012.

[30] We are further fortified in our view by the Federal Court's recent decision in *Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd (supra)*. Here, the Federal Court had occasion to consider the meaning of the phrase "debt due and accruing due" in O. 49 r. 1. Although there was substantial debate on whether monies held in fixed deposit accounts used to secure the respondent bank's grant of various banking facilities to the judgment debtor could be uplifted and utilised by the respondent bank to set

A off the debt, or could these same monies be paid over under the order of garnishment, that issue is not relevant for the purposes of this appeal. After examining a line of authorities including the case of *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357, the Federal Court went on to propound the view that for a debt to be due
B and accruing due to the judgment debtor, there must be, at the time of application of the garnishee order a crystallised actionable debt owed by the garnishee to the judgment debtor.

[31] Thus, a judgment creditor is not entitled to garnish the debt before it becomes due and payable. The Federal Court also approved of the case of
C *Binamin MJC Quarry Sdn Bhd v. Way Soon Construction Sdn Bhd (Intervener) (supra)*, where it was similarly held that there must be a crystallised actionable debt by the garnishee to the judgment debtor before an absolute garnishee order could be given.

[32] Premised on the authorities abovementioned, we are of the considered
D view that since the alleged debt referred to in Note 9 of the 2012 Financial Statement has no fixed terms of repayment, it has not crystallised into an actionable debt to qualify as a "debt due or accruing due" for the purposes of O. 49 r. 1 of the Rules of Court 2012. We are not convinced that there is a debt due or accruing due from the garnishee to the judgment debtor, upon
E which the judgment creditor could garnish and have the debt settled directly to the judgment creditor.

[33] The learned judge failed to take any of the aforementioned matters into consideration. Had the learned judge done so, it would not be proper for this court to interfere as it is an exercise of discretion and the learned judge would
F be entitled to draw his conclusions. But, in the instant appeal, the learned judge has plainly erred in the appreciation and application of the legal principles pertaining to the grant of a garnishee order.

[34] We add that in the event of such conflicting evidence, there is the further option of O. 49 r. 5. Under this provision, the learned judge may
G direct the issue of establishing whether there was a debt due and accruing due be disposed of through *viva voce* evidence. That, too, was not considered.

[35] Thus, it is our unanimous finding that the decision of the learned High Court Judge was plainly wrong and warrants appellate intervention.
H Accordingly, we allow this appeal with no order as to costs. The decision and order of the High Court is therefore set aside.

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